The Central Law Journal.

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CURRENT TOPICS.

The case of the Bank of Commerce v. Hoeber, recently decided by the St. Louis Court of Appeals, a report of which will be found in another column, is of such pre-eminent importance that no apology is due to our readers for devoting space to a report of it in full, notwithstanding the court from where it emanates is not of final jurisdiction. The conclusion arrived at by the court is unquestionably the right one upon principle as well as upon authority, though it may seem at first blush repugnant to the nature of a contract for the action of a third party (for such is virtually the position occupied by the attorney of the debtor while acting beyond the limits of his authority, and dealing with a creditor who is aware of the extent of such limits) to render void the agreement of the innocent debtor, and each of his other equally innocent creditors. But it should be borne in mind that a composition-agreement between a debtor and his creditors is a single entire contract to which all of the creditors and the debtor are parties, each creditor contracting with the debtor and with all the other creditors, rather than a series of separate contracts between each creditor and the debtor. Such a contract between a single creditor and the debtor, whereby the former agrees to take less than his demand, is void for want of consideration, but where all the creditors enter into a mutual agreement with each other and with the creditor, whereby each agrees to take less than is due him in satisfaction of his claim, the mutuality in the relation of the creditors to each other furnishes the consideration which gives vitality to the entire transaction. Consequently, the element of fraud in the relation of one of the creditors to the debtor, by which he derives a greater benefit than his fellow-creditors, destroys the mutuality of their relations and vitiates the consideration upon which the whole edifice of the composition-agreement rests.

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Measures are pending in England which, it is thought, will have the effect to eliminate trial by jury in civil causes from their system of procedure. The *Law Times* has this to say upon the subject: "A contemporary notices the fact that the voice of the bar has not been heard respecting the pending rules which threaten, among other things, practically to abolish trial by jury in civil cases. It is remarked that the bar has no organization to protect its interests. We should have thought it was recognized that by this time the bar has no interests worth protecting; and, if it had, no organization could have any effect when a revolutionary Parliament is backed up by a unanimous judicature." And, further: "Will anyone be seriously concerned about the abolition of trial by jury? We emphatically give our vote in favor of such abolition. Juries have not trained minds—they can not weigh evidence—they are swayed in all directions by all sorts of considerations, and introduce lamentable uncertainty into legal administration. Judges are affirmed or reversed, but can not be made to try a case twice. And if suitors in chancery, admiralty, bankruptcy and county courts are satisfied with the decisions of judges, why should not all suitors in all civil causes be equally satisfied?" As to the relative position of the bar to the rest of the community, our distinguished trans-Atlantic contemporary is unquestionably right in the view expressed. We are somewhat surprised, however, at the advanced nature of its utterances on the subject of the jury trial. If the proposed rule shall become an accomplished fact, its practical operation will be watched by the profession of this country with no little interest. There is a general tendency here, we believe, to regard the experiment of such a radical character as to justify a desire for further discussion, and if possible the benefit of somebody else's practical experience.

An interesting life insurance case, recently decided by the Supreme Court of the United States, was Knickerbocker Life Ins. Co. v. Foley. The court, at the trial below, charged the jury that the occasional use of intoxicating liquors did not make the deceased a man

of intemperate habits, nor would an exceptional case of excess create such a condition as to justify the application of this character to him; that an attack of delirium tremens may sometimes follow a single excessive indulgence; and that the habits of the assured in the usual ordinary and every-day routine of his life were temperate, the representations made were not untrue within the meaning of the policy, even although he might have an attack of delirium tremens from an exceptional overindulgence. This view, taken by the court below, is sustained, and its judgment affirmed.

THE LATEST VIEWS OF INJURIES TO INFANTS.

Recent decisions have given much attention to the vital question of the contributory negligence of minor children, which, in its relation to the imputed negligence of parents, and its other various aspects, has been the subject of so much controversy. In a Massachusetts case of recent date,[1] being an action for personal injuries occasioned to a boy seven years old, by being run over by defendant's wagon, while sitting on the sidewalk of a street, the evidence was conflicting as to the character and condition of the sidewalk, and whether it was clearly separated from the rest of the street. The judge instructed the jury fully as to the rights of travelers with wagons and on foot in public highways. He then declared that the plaintiff could not recover, unless at the time of the injury he was in that part of the highway where it was then proper for him to be, and was in the exercise of due care. The defendant then asked the judge to rule that, if the plaintiff was sitting on the sidewalk, and the sidewalk was a part of the street over which both wagons and foot-passengers passed, he was negligent, and could not recover. The judge declined so to rule, and ruled as follows: "If the boy was sitting on a sidewalk which was clearly defined and distinguishable from the traveled way, which was sufficient for persons passing with teams, he had a right to be there; that was a proper use of the sidewalk, and the defendant would have no right to drive his horse on the sidewalk against him." It was held by the highest tribunal that the defendant had no ground of exception to these rulings and instructions. That court declared that it could not say, as a matter of law, that it was contributory negligence in a child under seven years of age, to sit within the limits of a highway forty feet wide, about two or three feet from a picket fence bordering on the street, not far from his residence, with an elder brother five or six feet from him, while the character of the street, its conformation, the manner in which it was wrought, the point whether it was with or without sidewalks was undisclosed and in dispute. The instructions given were then discussed and sustained.

A ruling of much interest on this topic of contributory negligence has been made in Missouri within a period not very remote.[2] The plaintiff was a girl eleven years of age. While on the sidewalk she was struck by a falling brick from a building undergoing repair. There was a barrier across the sidewalk consisting of a plank, but it offered no obstacle to the passage of children. It was held that a child of the age of plaintiff, on seeing that the space between the plank and the sidewalk was nearly five feet, was not guilty of contributory negligence in going upon the sidewalk, as matter of law. The issue was for the determination of the jury.

Children of tender years have also recently been held not guilty of contributory negligence where the infant lay dizzy or asleep on a railroad track;[3] or, as a matter of law, where he was stealing a ride on a train, and, being ordered off, tried to crawl through a window, lost his hold, fell and was killled;[4] or, as a matter of law, where a child strayed away from his home without the knowledge or consent of his parents, and went upon a railroad track near by, where a coal car, coming down a steep grade with loosened brakes, ran over him.[5] But the contrary view that the

[1] Murley v. Roche, 130 Mass. 330 (decided February 21, 1881).

[2] Mannerman v. Senmarts, 10 Reporter, 639 (decided 1880).

[3] Meeks v. Southern Pacific, etc. R. Co., 56 Cal. 517.

[4] Benton v. Railroad Co., 11 Reporter, 837 (decided by the Supreme Court of Iowa March 24, 1881).

[5] Smith v. Atchison, etc. R. Co., 13 Cent. L. J. 118 (decided by Supreme Court of Kansas, April 19, 1881).

child was guilty of contributory negligence, has been lately put forth in Pennsylvania, in ruling as to the admissibility of evidence that a young boy was playing on a freight-train, and was ordered off, and his mother, being present, remonstrated, when a brakeman approached and the boy jumped off and was injured.[6]

The difficulty in case of injuries to pupils occurring around school premises has always been to determine upon whom the responsibility rests. Upon the idea that a municipal corporation is regarded as free from liability for damages sustained by reason of its neglect to perform a governmental, or public duty, citizens have failed to recover against a town or city for an injury to a child, caused by a dangerous excavation in a school-house yard, and for an injury to a pupil from the unsafe condition of a staircase in a school-house.[7]

Such have been the rulings under the public-school system of Massachusetts. In New York actions for injuries on school premises have also failed in the court of last resort, as in the case of a teacher who stepped through a hole in the floor of a school-room, and was injured, but failed to recover because she sued the trustees instead of the corporation.[8] In a very recent case, the Court of Appeals of that State has taken similar ground. The injuries which the scholar suffered were sustained by falling into an excavation, in the yard of the ward school, of which the grating had been left open. This omission was the fault of the janitor, or masons, employed by the ward trustees in repairing the school building. It was held that the ward trustees act as independent public officers, and that the board of education, which was sued, was not liable for the acts of such trustees or their servants.[9] In Iowa a well-borer contracted with a school-district to bore a well in the school-house yard. He left the machine unlocked and unguarded, and thereby one of the school-children was injured while playing with it in his absence. It was held that the school district was not liable, as the negligence was that of an independent contractor.[10] Again, in Pennsylvania, it has been lately held that a school district is not liable for injuries caused to one of the scholars by the falling of a wall weakened by alterations to the school-house, when the alterations were being made by a contractor, although the school district employed an architect to superintend his work.[11]

The narrow line which separates a pure misadventure resulting in injury, for which no one is responsible, from accident where negligence exists creating responsibility, was declared not to have been overstepped in the case of a ferry slip casualty, in Loftus v. Union Ferry Company.[12] There the intestate was a boy six years old. One evening his mother with her two children, the youngest an infant nineteen months old, entered the defendant's ferry boat at Brooklyn to go to New York. On reaching the New York side of the river, after the boat had been secured, and most of the other passengers had left the boat, she started with her children to pass over the bridge, or passage-way, leading to the wharf. In some manner not clearly explained (but probably due to the child being startled and stumbling over the sill), the boy fell into, or got through, the opening in the guards, and, falling into the water between the bridge and the pier, was drowned. The case was held governed by the authority of Dunigan v. Champlain Transportation Company,[13] Crochon v. Staten Island Ferry Company,[14] and Cleveland v. New Jersey Steamboat Company.[15] The open space, as the court pointed out, through which the child fell, was so left to allow for the movement of the bridge caused by the tides and the impact of the boat on entering the slip. It had been conceded that over forty millions of people had passed over these

6 Cauley v. Pittsburgh, etc. R. Co., 12 Cent. L. J. 281; 11 Reporter, 67 (decided November 8, 1880).

7 Bigelow v. Randolph, 14 Gray, 543; Hill v. City of Boston, 122 Mass. 344.

8 Bassett v. Fish, 19 Alb. L. J. 160; s. c., 12 Hun. 209, reversed. This, and preceding cases, are more fully stated in 2 Thomps. on Negl., 312, sec. 8.

9 Donovan v. Board of Education of City of New York, 12 Reporter, 536 (decided April 19, 1881). This, apparently, overrules the same case in 55 How. Pr. 176.

10 Wood v. Independent School District, 44 Iowa, 27, cited 2 Thomps. on Negl., 1196.

11 School District of Erie v. Fuess (decided Supreme Court of Pennsylvania, Nov. 14, 1881); digested 14 Cent. L. J. 97.

12 12 Reporter, 246 (decided by the New York Court of Appeals on March 8, 1881).

13 56 N. Y., 1.

14 56 N. Y., 656.

15 68 N. Y., 306.

ferries, and no accident of this character had previously happened. Hence the company could not have foreseen it, and was not responsible for it. It was also remarked that, while it might seem likely that a small child would fall through the opening, yet, as small children were usually in charge of parents or guardians, the accident might not be anticipated.

In the case of injuries to children caused by the wrongful act, neglect or default of another, the extent of the recovery is the broadest where the suit is brought by the child for his own benefit, through his legal representative. The child may recover damages for the pain and suffering he has endured, both in body and in mind, for the expenses of his case, and for any permanent injury to his person. But to recover for the last named element, according to a late ruling, he must call for special instructions, authorizing such permanent injury to be considered by the jury. If he fails to do so, it seems, he can not complain of an omission so to charge as error.[16] Where the suit is brought, however, by another person instead of the directly injured party, as, for instance, by a parent, damages are awarded on a more restricted basis. There can then be no recovery for injuries personal to the child, as his physical or mental pain and suffering, or disfigurement of his person, but in theory at least, the parent (or his substitute in the litigation) recovers only for loss of service. Even the expenses of medical aid and attendance have been treated as dependent on such loss. The same rule as to the exclusion of the child's sufferings from the consideration of the jury has been very recently held to apply where the statute provides that in case of injury to minors, or their death, or the death of adults, such damages may be given "as, under all the circumstances of the case, may be just." The action was against a railroad company for running over plaintiff's child with a locomotive engine, and thereby injuring him so severely that amputation of his feet became necessary. The judge of the trial court charged the jury as follows: "The question of damages is one for your consideration, and you may award such damages as, in view of all the circumstances—the mental capacity of the boy himself, and of the injury inflicted upon him, may seem to you just. Whatever amount of money, in your judgment, will compensate him for his injuries, that will be the amount of your verdict." The judge had previously declined to charge that there could be no recovery by the father for the pain and suffering which his son experienced from the injuries he received, or from his disfigurement therefrom. On appeal the instruction and ruling were held erroneous, as contrary to the common law, and not justified by the phraseology of the statute, which had not so far enlarged the ordinary doctrine on the subject. The guardian could recover such damages for the child, but the father could not sue and recover damages both as parent and guardian; for there was no provision in the statute authorizing the father to sue for and in behalf of the infant, or protecting the beneficiary against the plaintiff's possible appropriation of the proceeds to his own use.[17]

In the case of injuries resulting in death, there is still further abridgment of the measure of damages, by the exclusion of all elements of pain and suffering, either on the part of the deceased child or the surviving parent or relative.[18] This ruling is in accord with the previous cases[19] of Penn. R. Co. v. Kelly;[20] Oakland R. Co. v. Fielding;[21] Stewart v. Ripon.[22] At common law, it is reiterated in a recent decision, the death of a human being, though clearly involving pecuniary loss, is not the subject of an action for damages.[23] "There are a few cases decided in this country," it is remarked in another late opinion, "notably that of Sullivan v. Union Pacific R. Co.,[24] where it is held that such an action can be maintained. But it is evident, from an examination of the cases, that such decisions are not derived from the common law."[25] "Indeed," it is further as-

[16] Menges v. Muncey Creek Township, 12 Reporter, 845 (decided by Supreme Court of Pennsylvania, June 20, 1881.

[17] Durkee v. Central Pacific R. Co., 56 Cal. 388.

[18] Penn. R. Co. v. Lilly, 73 Ind. 254 (May term, 1880).

[19] Cited 2 Thomp. Neg. 1260, as establishing the rule.

[20] 31 Pa. St. 372.

[21] 48 Pa. St. 323.

[22] 38 Wis. 584.

[23] Edgar v. Castello, 14 S. C. 20 (1880).

[24] 3 Dillon, 335.

[25] Wilson v. Burmstead, 11 N. W. Rep. 411 (Supreme Court Neb., Nov. 9, 1881).

serted in the former case, "we do not find that it is anywhere decided that the father could maintain such an action except where it is alleged and proved that the father has sustained damage by reason of the loss of services of the child, or by reason of funeral or other expenses incurred from the killing of the child.[26] Even under statutes giving the right of action to the personal representatives of the deceased, it has been held in England that the father could not recover for the killing of the child merely;[27] and the same view has, within a more recent period, been adopted in South Carolina and Nebraska.[28] In accordance with these views, it has also lately been laid down that to enable the parent to recover full damages for the loss of services of the child during his minority, such damages must be specially declared for and demanded. This requirement is in accordance with the rules of good pleading, and is recognized as obligatory in the case of Gilligan v. N. Y., etc. R. Co.,[29] which has become a leading case in actions of the class to which this belongs, and which has been either cited approvingly, or followed by many of the text-writers and other decided cases.[30]

The entire measure of damages in action by parent for the death of his child, has received fresh expression in late decisions. The recovery was stated to embrace the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects of (misprinted "in") life, less his support and maintenance. To this should be added in proper cases,[31] the expense of care and attention to the child, made necessary by the injury, funeral expenses[32] and medical services.[33] The points, therefore, to be considered in estimating the amount which is a fair compensation for the loss of services which the parent has sustained are, the age, health and habits of the deceased, his capacity for labor, the possibility of his living to the age of majority, and the fair and probable cost of his clothing, maintenance and care, and such matters as are inseparably connected with his bringing-up.[34] Hence the erroneous character of the rule given by judge in the court below in the case last cited. There the jury were allowed to aggregate the amounts of monthly earnings proven, and to give a present verdict for that total amount, less the probable cost of maintenance, etc. This, the appellate court showed, was assuming that the money would have been earned all at one time and immediately, if the deceased had not been killed; and left out of view the consideration of the time of the verdict as related to the time when the services would have been rendered.

The question whether an action of the character under discussion would survive the death of the defendant pending its progress, has lately been passed upon by the Supreme Court of New York.[35] The action in which the matter was considered,[36] was brought against a plumber for negligently and improperly making certain repairs in the plaintiff's house, so as to allow the gas to escape from the sewer into the house, and to seriously injure the health of the plaintiff and that of his family. The complaint further alleges that in addition to these injuries, the plaintiff's five children were sickened and poisoned by the gases; that three of them died after a protracted illness; and that the plaintiff was put to great trouble and expense to provide nursing, necessary care and medical treatment both for himself and his children. The defendant having died after issue joined, the plaintiff moved to have the action revived against his executrix, and for leave to file a

26 Edgar v. Costello, *supra*.

27 Osborn v. Gillet, L. R. 8 Ex. ch. 88 (1873).

28 See Edgar v. Castello, and Wilson v. Rurmstead; *supra*. But for the New York view, see McGovern v. N. Y. Central R. Co., 67 N. Y. 417.

29 1 E. D. Smith, 453.

30 Safford v. Drew, 3 Duer. 327; Rogers v. Smith, 17 Ind. 323; Penn. R. Co. v. Lilly, 73 Ind. 254. To the same effect see, Edgar v. Castello, 14 S. C. 20. But in New York lack of proof of pecuniary special damage will not justify a verdict for nominal damages only in a suit for the death of a child. Gorham v. N. Y. Central, etc. R. Co., 23 Hun. 449 (June term, 1881); following Ihl v. Forty-second street R. Co., 47 N. Y. 317.

31 See the late case of Scott v. Brown, 34 Hun. 620.

32 Provided they are specially averred. Edgar v. Costello, 14 S. C. 20; Wilson v. Burmstead, 10 N. W. Rep. 412.

33 Pennsylvania R. Co. v. Lillly, 73 Ind. 252.

34 Benton v. Railroad Co., 11 Reporter, 837 (Supreme Court Iowa, March 24, 1881).

35 The converse question of the effect of the death of the real plaintiff was considered in an early English case (of which a synopsis is given in 2 Thompson Neg. 1287, sec. 87), where the injured child on whose behalf the action was brought by his next friend, died seven days after the trial, and a new trial was refused. Kramer v. Waymurt, 4 H. & C. 427.

36 Scott v. Brown, 24 Hun. 620 (May, 1881).

supplemental complaint. It was held that in so far as the action was brought to recover damages for the injuries occasioned to the plaintiff's person, it abated by the death of the defendant; but in so far as it was brought to recover for the damages and expenses occasioned by the sickness of his children, it survived, and should be revived against the defendant's executrix. The ruling has its general interest diminished by the fact that it was based upon the interpretation of the local statute. That provides for the survival and revivor of actions for "wrongs done to the property, rights or interests of another;" but expressly excepted from its operation, "actions in the case for injuries to the person of the plaintiff." The conclusion of the court was reached by giving effect to both clauses.[37]

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[37] The decision followed Cregan v. Brooklyn Cross Town R. Co., 75 N. Y. 192, which was an action by a husband against a common carrier of passengers, for injuries to his wife, and where it was held (under the same statute) that the action did not abate upon the death of the plaintiff, and might be revived in the name of his personal representative. Wade v. Kalbfleisch, 58 N. Y. 282, was distinguished as an action upon contract for breach of promise of marriage.

PRESUMPTIONS OF LIFE, DEATH AND SURVIVORSHIP.

I.

The subject on which we propose here to touch (in reference to which the latest decision is that of the Land Commission in Gill v. Manly),[1] is one that has given rise to problems of the greatest intricacy, and cases of peculiar and even romantic interest, while the divergencies of the law of different countries can not fail to attract the earnest attention of the comparative jurist. Something, too, may be found to say upon it that has not been already stated in the elaborate note to Nepean v. Doe in Smith's Leading Cases; and, at all events, we do not propose to travel over the ground there occupied, but, by reference to what is there said (to which we do not intend to advert), the reader may supply any deficiencies in our own treatment, which, in some respects, we advertently confine within a more limited scope, dealing chiefly with the most recent cases or with matters not elsewhere accessibly noted.

As regards presumptions in favor of the continuance of life, it was said of old by Stair, treating of the Scottish law, "Life is presumed. This some do extend to an hundred years of age, but others only to fourscore, which is confirmed by that of the Psalmist, that the age of man is threescore ten unless by strength of nature he comes to fourscore. Hence it is that heirs can not be served upon presumption of the death of their predecessor unless witnesses or fame concur, and hence also women may not marry in their husband's absence until that age." But, in 1871, we find Lord Deas thus referring to this theory: "The law undoubtedly holds that there is a presumption in favor of life, even although it is proved that a party has gone to a distant region and has not been heard of for a considerable period of years. This presumption admittedly ceases entirely at the end of a hundred years from the date of his birth. But there is no rule requiring that the hundred years shall actually have elapsed before it shall be inferred from facts and circumstances that the party is dead. The presumption of life is stronger or weaker during that century as more or less of the period has elapsed, and according as more or less time has elapsed since the party was heard of." Subsequent decisions introduced perhaps somewhat more relaxation, though still the Scottish judges were especially cautious in this matter;[2] but now it is regulated by a special act of Parliament.[3] In England, too, it was once considered that there was a presumption that a person continues alive until the contrary be shown.[4] But in *Re* Phene's Trusts,[5] the question whether there was any presumption of law that a person continued to live, arising upon proof of prior existence, was very fully discussed, and it was held that, whether in civil or criminal cases, the law makes no such presumption; and so, in R. v. Lumley,[6] it was held

[1] 16 Ir. L. T. Rep., 57.

[2] See Stewart v. Stewart, 2 R. 488; M'Lay v. Borland, 3 R. 1124.

[3] 44 & 45 Viet., c. 47.

[4] Wilson v. Hodge, 2 East, 313.

[5] L. R., 5 Ch. 150.

[6] L. R., 1 C. C. R. 196.

that there was no presumption either way. This question was discussed in the American case of Montgomery v. Bevans,[7] where Field, J., after examining the English cases, said: "But the law as thus declared in England is different from the law which obtains in this country, so far as it relates to the presumption of the continuance of life. Here, as in England, the law presumes that a person who has not been heard of for seven years is dead; but here the law, differing in this respect from the law of England, presumes that a party once shown to be alive continues alive until his death is proved, or the rule of law applies by which death is presumed to have occurred—that is, at the end of seven years. And the presumption of life is received in the absence of any countervailing testimony as conclusive of the fact, establishing it for the purpose of determining the rights of parties as fully as the most positive proof. The only exception to the operation of this presumption is when it conflicts with the presumption of innocence, in which case the latter prevails." The principle last mentioned was approved in another American case decided last August: People v. Feilen,[8] and is sustained by the English case of R v. Twyning.[9] The recent case of R v. Willshire[10] is, also, an authority that those conflicting presumptions neutralize each other, and that in such case the question should be left to the jury as a naked matter of fact;[11] but, there we find some expressions of Coleridge, C. J., in favor of holding that from proof of the existence of life its continuance may be presumed. In that case it appeared that in 1864 W married A. In 1868 he was convicted of bigamy for marrying B, A being then alive. In 1879 he married C, and in 1880, C being then alive, he married D. On a charge of bigamy against this much-married man, for marrying D, C being then alive, whereupon he set up the defense that A was alive when he married C, it was held that the question should have been left to the jury whether A was not alive when he married C; as, if so, the marriage with C would be invalid. The prisoner had set up a life in 1868, which, said the learned judge, "must be presumed to be continuing in 1879, no evidence of any kind being given, but it being shown simply that the woman was alive in 1868. * * * * The prisoner was not bound to do more than to set up the life in 1868, which would be presumed to continue, and it was then for the prosecution to show by evidence that that presumption was rebutted." And see *Re* Corbishley's Trusts,[12] holding that, where a *cestui que trust*, who takes a vested interest under a settlement, has not been heard of since a period prior to the date of the settlement, the presumption is that he was alive at that date. Nor can we quarrel with Mr. Litton's judgment in Gill v. Manly,[13] when in reference to the alleged death of a *cestui que vie* who, if alive, would be only about sixty years of age, he considered quite within the probabilities of human existence that the person in question might still be alive and well, and that there should be stronger evidence of his death than the mere fact of his absence from the country without being heard of.[14] In the Scottish case of Master and Seaman of Dundee v. Cockerill,[15] a seaman turned up after an absence of sixteen years, and had the pleasure of being ordered to refund considerable payments which had been made by a charitable society to his wife *qua* widow; and it is not long since our pages were occupied with a romantic case in which administration on the estate of a living person had been granted;[16] the law on which subject has been ably treated in a recent number of the *American Law Review*;[17] and not without reason it is held that a grant of administration is not sufficient proof of death.[18] In Ommaney v. Stillwell,[19] it was held to have been shown that a person who sailed with Sir John Franklin in 1845 was alive in 1850; and in 1858 the Franklin expedition gave rise to another curious case, in Scotland, on the subject of the presumption of life, Fairholme v. Fairholme's Trustees,[20] where the Lord Justice

7 1 Sawyer, 666.
8 8 Pacific Coast L. J. 163.
9 2 B. & Ald. 385; and see R v. Lumley, *ubi supra*.
10 6 Q. B. D. 366; 44 L. T. N. S. 222.
11 See Bishop on Stat. Crimes, sec. 611.
12 14 Ch. D. 846; 49 L. J. Ch. 266.
13 16 Ir. L. T. Rep. 57.
14 Cf. *in re* Webb's Estate, Ir. R. 5 Eq. 235.
15 8 M. 278.
16 15 Ir. L. T. 20.
17 1 Am. L. Rev. (N. S.) 337.
18 *Re* Beamish, 9 W. R. 475; Wms. Ex'rs.
19 23 Beav. 328.
20 20 D. 813.

Clerk observed: "There have been at different times cases of very great interest as to the fate of persons who have gone on foreign expeditions, and great difficulties have arisen in regard to the evidence of death; but this case possesses a most peculiar interest. It is impossible for us not to feel that it has this character to an extent which no other case on record possesses, and it is curious that the best and most authentic, and indeed the only connected evidence as to the fate of the Franklin expedition is that which is afforded by the proof in this case, which would form, if published, a most deeply interesting pamphlet." It was here held that the survivors of that expedition had perished in or about the spring of 1850; while in Ommaney's case it was held that one of them was still alive then. But, as we have no ambition to write a deeply interesting pamphlet, we shall pass on to the next branch of our subject.—*Irish Law Times*

CORPORATION—DEPRECIATION OF STOCK BY DIRECTORS—SHAREHOLDERS' RIGHT OF ACTION—COLLUSION TO GIVE FEDERAL JURISDICTION.

HAWES v. CONTRA COSTA WATER CO.

Supreme Court of the United States, October Term, 1881.

The appellant, a shareholder in the Contra Costa Water-works Company, brought his bill in equity against that company and the city of Oakland in the circuit court of the United States for California, on the ground that he was a citizen of New York and the defendants citizens of California, alleging that the water-works corporation was furnishing the city of Oakland water, free of charge, beyond what the law required it to do, and that though he had requested them to desist the directors continued to do this, to the great injury of himself and other shareholders and the company.

The court examines the right of the shareholder to sustain such a suit, in the light of the authorities, English and American, including Dodge v. Woolsey, 18 How. 331, and holds that in such cases there must exist as the foundation of the suit:

1. Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred by their charter or other source of organization; or,

2. Such a fraudulent transaction, completed or threatened, by the acting managers, in connection with some other party, or among themselves, or with the other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or,

3. Where the board of directors, or a majority of them, are acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or,

4. Where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

5. It must also be made to appear that plaintiff has made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation.

6. That he was the owner of the stock on which he claims the right to sue at the time of the transactions of which he complains, or that it has since devolved on him by operation of law.

7. That the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it would otherwise have no cognizance.

Appeal from the Circuit Court of the United States for the District of California.

This is an appeal from the Circuit Court for the District of California, for a decree in chancery dismissing the appellant's bill.

Mr. Justice MILLER delivered the opinion of the court:

The plaintiff, who is a citizen of New York, alleges himself to be a stockholder in the Contra Costa Water-works Company, a California corporation, and he files his bill of complaint on behalf of himself and all other stockholders who may choose to come in and contribute to the costs and expenses of the action. The defendants are the city of Oakland, the Contra Costa Water-works Company, and Anthony Chabot, Henry Pierce, Andrew J. Pope, Charles Holbrook and John W. Coleman, trustees and directors of said company. The foundation of complaint is, that the city of Oakland claims, at the hands of the Water-works Company, water, without compensation, for all municipal purposes whatever, including watering the streets, public squares and parks, flushing sewers, and the like, whereas it is only entitled to receive water free of charge in cases of fire or other great necessity; that the Water-works Company comply with this demand to the great loss and injury to the company and to the diminution of the dividends which should come to him and other stockholders, and the decreased value of the stock. The allegation of his attempt to get the directors of the company to correct this evil will be given in the language of the bill. He says that "on the 10th day of July, 1878, he applied to the president and board of directors or trustees of said Water Company and requested them to desist from their illegal and improper practices aforesaid, and to limit the supply of water free of charge to said city, to cases of fire or other great necessity, and that said board should take immediate proceedings to prevent said city from taking water from the works of said company for any other purpose without compensation; but said board of direct-

ors and trustees have wholly declined to take any proceedings whatever in the premises, and threaten to go on and furnish water to the extent of said company's means to said city of Oakland free of charge, for all municipal purposes, as has heretofore been done, and in cases other than cases of fire or other great necessity, except as for family uses hereinbefore referred to; and your orator avers that by reason of the premises said Water Company and your orator and the other stockholders thereof have suffered and will, by a continuance of said acts, hereafter suffer great loss and damage."

To this bill the Water-works Company and the directors failed to make answer, and the city of Oakland filed a demurrer, which was sustained by by the court and the bill dismissed. Two grounds of demurrer were set out and relied on in the court below, and are urged upon us on this appeal. They are: 1. That appellant has shown no capacity in himself to maintain this suit, the injury, if any exists, being to the interests of the corporation, and the right to sue belonging solely to that body. 2. That the city of Oakland is entitled to receive, free of compensation, all the water which it is charged to be so using in this bill, by a sound construction of the law under which the company was organized.

The first of these causes of demurrer presents a matter of very great interest, and of growing importance in the courts of the United States. Since the decision of this court in the case of Dodge v. Woolsey, 18 How. 331, the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a stockholder of a corporation who possesses the requisite citizenship, in cases where the corporations whose rights are to be enforced have no right to sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles. This practice has grown until the corporations created by the laws of the States bring a large part of their controversies with their neighbors and fellow-citizens into the courts of the United States for adjudication, instead of the State courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another State. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protects He instantly demands of them to do their duty in this regard, which of course they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery, namely: one, against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the circuit court of the United States, because he is a citizen of a different State, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to its merits. In either event the whole case is prepared for a hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction. That the vast and increasing proportion of the active business of modern life which is done by corporations should call into exercise the benificent powers and flexible methods of courts of equity, is neither to be wondered at nor regretted, and this is especially true of controversies growing out of the relations between the stockholder and the corporation of which he is a member. The exercise of this power in protecting the stockholder against the frauds of the governing body of directors or trustees, and in preventing their exercise, in the name of the corporation, of powers which are outside of their charters or articles of association, has been frequent, and is most beneficial, and is undisputed These are real contests, however, between the stockholder and the corporation of which he is a member.

The case before us goes beyond this. This corporation, like others, is created a body politic and corporate that it may in its corporate name transact all the business which its charter or other organic act authorizes it to do. Such corporations may be common carriers, bankers, insurers, merchants, and may make contracts, commit torts, and incur liabilities, and may sue and be sued in their corporate name in regard to all these transactions. The parties who deal with them understand this, and they are dealing with a body which has these rights and is subject to these obligations, and they do not deal with or count upon a liability to the stockholder whom they do not know and with whom they have no privity of contract or other relation. The principle involved in the case of Dodge v. Woolsey, permits the stockholder in one of these corporations to step

in between that corporation and the party with whom it has been dealing and institute and control a suit in which the rights involved are the corporation, and the controversy one really between that corporation, entirely capable of asserting its own rights, and the other party, who is equally so. This is a very different affair from a controversy between the shareholder of a corporation and that corporation itself, or its managing directors or trustees, or the other shareholders, who may be violating his rights or destroying the property in which he has an interest. Into such a contest the outsider, dealing with the corporation through its managing agents in a matter within their authority, can not be dragged, except where it is necessary to prevent an absolute failure of justice in cases which have been recognized as exceptional in their character and calling for the extraordinary powers of a court of equity, it is, therefore, always a question of equitable jurisprudence, and as such has, within the last forty years, received the repeated consideration of the highest courts of England and of this country. The earliest English case in which this subject received any very careful consideration is that of Foss v. Harbottle, before Vice-Chancellor Wigram, whose very full and able opinion is reported in 2 Hare's Chan. R. 488. The case was decided in 1843 on a demurrer to a bill, which was brought by Foss & Turton, two shareholders in an incorporation called the Victoria Park Company, on behalf of themselves and all other stockholders, except those who were made defendants, against the directors and one shareholder not a director,and against the solicitor and architect of the company. The bill charged the defendants with concerting and effecting various fraudulent and illegal transactions, whereby the property of the company was misapplied,aliened, and wasted. It alleged that there had ceased to be a sufficient number of qualified directors to constitute a board; that the company had no clerk or office; and it prayed for the appointment of a receiver and a decree against the defendants to make good the loss. After showing that the case was one in which the right of action was in the company, the Vice-Chancellor says; "In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this, and the only question can be, whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative." Again, after pointing out that cases may arise where the claims of justice would be found superior to the technical rules respecting the mode in which corporations are required to sue, he adds: "But on the other hand, it must not be without reasons of a very urgent character that the established rules of law and practice are to be departed from, rules which, though in a sense technical, are founded on the general principles of justice and convenience; and the question is whether a case is stated in this bill entitling plaintiffs to sue in their private character." He then in an elaborate argument holds that the bill is fatally defective because it does not aver that there is no acting or *de facto* board of directors who might have ordered the bringing of this suit; and,secondly,that it was the duty of the plaintiffs—the two shareholders who complain of what had been done—to have called a meeting of the shareholders, or attended at some regular annual meeting and obtained the action of a majority on the matters in issue. The majority, he says, may have been content with what was done, and may have ratified the action of the board, in which case the whole body would have been bound by it. The demurrer was sustained and the bill dismissed. In the subsequent case of Mozeley v. Alston, 1 Phillips' Ch. R. 790, decided in 1847, Lord Chancellor Lyndhurst says that "the observations of the vice-chancellor in Foss v. Harbottle, correctly represent what is the principle and practice of the court in reference to suits of this description." These cases have been referred to again and again in the English courts as leading cases on the subject to which they relate, and always with approval. In the case of Gray v. Lewis, decided in the Chancery Appeals, in 1873, Sir W. M. James, L. J., said: "I am of opinion that the only person, if you may call it a person, having a right to complain was the incorporated society called Charles Lafitte & Co. In its corporate character it was liable to be sued and was entitled to sue, and if the company sued in its corporate character, the defendant might allege a release or a compromise by the company in its corporate characacter—a defense which would not be open in a suit where a plaintiff is suing on behalf of himself and other shareholders. I think it is of the utmost importance to maintain the rule laid down in Mozeley v. Alston, and Foss v. Harbottle, to which, as I understand, the only exception is where the corporate body has got into the hands of directors, and of the majority, which directors and majority are using their power for the purpose of doing something fraudulent against the minority, who are overpowered by them, as in Atwood v. Merryweiher, where Vice-Chancellor Wood sustained a bill by a shareholder on behalf of himself and others, and there it was after an attempt had been made to obtain proper authority from the corporate body itself in a public meeting assembled." Law Reports, 8 Chy. 1035. But perhaps the best assertion of the rule and of the exceptions to it are found in the opinion of the court by the same learned justice in the case of McDougall v. Gardner, in 1875, Law Reports, 1 Chancery Division, 21. "I am of opinion," he says, "that this demurrer ought to be allowed. I think it is of the utmost importance in all these controversies that the rule which is well known in

this court as the rule in Mozeley v. Alston. and Lord v. Copper Mining Company, and Foss v. Harbottle, should always be adherred to: that is to say, that nothing connected with internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent—unless there is something *ultra vires* on the part of the company *qua* company, or on the part of majority of the company, so that they are not fit persons to determine it. but that every litigation must be in the name of the company if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things which a company may well be entitled to complain, but which, as a matter of good sense, they do not think it right to make the subject of litigation, and it is the company as a company which has to determine whether it will make anything that is a wrong to the company a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done." The cases in the English courts are numerous, but the foregoing citations give the spirit of them correctly.

In this country the cases outside of the Federal courts are not numerous, and while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of fraud, or a breach of trust, or are proceeding *ultra vires*. See Marsh v. Eastern R. Co., 40 N. H. 549; Peabody v. Flint, 6 Allen 52; Brown v. Boston Theater, 104 Mass. 378, where the general doctrine and its limitations are very well stated. See, also, Hersey v. Veazie, 24 Maine, 9; and Samuels v. Holloday, 1 Woolworth, 400. The case of Dodge v. Woolsey, decided in this court in 1855, is, however, the leading case on the subject in this country. And we do not believe, notwithstanding some expressions in the opinion, that it is justly chargeable with the abuses we have mentioned. It was manifestly well considered, and the opinion is unusually long, discussing the point now under consideration with a full reference to the decisions then made in the courts of England. The suit—a bill in chancery—was brought in the circuit court for the District of Ohio by Woolsey, a stockholder of the Commercial Bank of Cleveland, and a citizen of Connecticut, against that bank, its managing directors, and Dodge, tax-collector of the county in which the bank was situated, citizens of Ohio. The bill alleged that Dodge had levied upon property of the bank to make collection of a tax, which, by the Constitution of the State of Ohio, the bank was bound to pay; that in that respect the Constitution, then recently adopted, impaired the obligation of the contract of the State with the bank, contained in its charter. It appeared in the case that Woolsey had, by letter directed to the board of directors, requested them to institute proceedings to prevent the collection of this tax; but the board, by a resolution, declined to take any such action, while expressing their opinion that the tax was illegal. In the opinion of the court, reciting the circumstances which justified its interposition at the suit of the stockholder, the allegation of the bill is adverted to, that if the taxes are enforced it will annul the contract of the State concerning taxation, and that the tax is so onerous upon the bank that it will compel a suspension and final cessation of its business. The following extract from Angell & Ames on Corporations is cited with approval: "Though the result of the authorities clearly is that in a corporation, when acting within the scope of, and in obedience to, the provisions of its Constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the act of incorporation the will of the majority can not make the act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension or simple negligence on the part of the directors." And the court adds: "It is obvious from this rule than the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought." A very large part of the opinion is devoted to the consideration of the high function of this court in construing the Constitution of the United States, and it is impossible not to see the influence on the mind of the writer of that opinion, of the fact that the only question on the merits of the case was one which peculiarly belonged to the Federal judiciary, and especially to this court to decide, namely, whether the Constitution of the State of Ohio violated the obligation of the contract concerning taxation found in the charter of the bank. As the law then stood there was no means by which the bank, being a citizen of the same State with Dodge, the tax-collector, could bring into a court of the United States the right which it asserted under the Constitution, to be relieved of the tax in question, except by writ of error to a State court from the Supreme Court of the United States. That difficulty no longer exists, for by the act of March 3, 1875, all suits arising under the Constitution or laws of the United States may be brought originally in the circuit courts of the United States without regard to the citizenship of the parties. Under this statute, if it had then existed, the bank in the case of Dodge v. Woolsey could undoubtedly have brought suit to restrain the collection of the tax in its own name, without resort to one of its shareholders for that purpose. And this same statute, while enlarging the jurisdiction of the circuit courts in cases fairly

within the constitutional grant of power to the Federal judiciary, strikes a blow by its fifth section at improper and collusive attempts to impose upon those courts the cognizance of cases not justly belonging to them. It declares if at any time in the progress of a case, either originally commenced in a circuit court, or removed there from a State court, it shall appear to said court "that such suit does not really involve a dispute or controversy properly within the jurisdiction of said court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further, but shall dismiss the suit or remand it to the court from which it was removed." It is believed that a rigid enforcement of this statute by the circuit courts would relieve them of many cases which have no proper place on their dockets. This examination of the case of Dodge v. Woolsey, satisfies us that it does not establish, nor was it intended to establish, a doctrine on this subject different in any material respect from that found in the cases in the English and in other American courts, and that the recent legislation of Congress referred to, leaves no reason for any expansion of the rule in that case beyond its fair interpretation.

We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit: Some action, or threatened action, of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases. But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.

The effort to induce such an action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transaction of which he complains, or that his shares have devolved on him, since by operation of law, and that the suit is not a collusive one to confer on a court of the United States, jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit. It is needless to say that appellant's bill presents no such case as we have here supposed to be necessary to the jurisdiction of the court. He merely avers that he requested the president and directors to desist from furnishing water free of expense to the city, except in cases of fire or other great necessity, and they declined to do as he requested. No correspondence on the subject is given. No reason for declining. We have here no allegation of a meeting of the directors, in which the matter was formally laid before them for action. No attempt to consult the other shareholders to ascertain their opinions, or obtain their action. But within five days after application to the directors this bill is filed. There is no allegation of fraud or of acts *ultra vires*, nor of destruction of property or irremediable injury of any kind.

Conceding appellant's construction of the company's charter to be correct, there is nothing which forbids the corporation from dealing with the city in the manner it has done. That city conferred on the company valuable rights by special ordinance, namely, the use of the streets for laying its pipes, and the privilege of furnishing water to the whole population. It may be the exercise of the highest wisdom to let the city use the water in the manner complained of. The directors are better able to act understandingly on this subject than a stockholder residing in New York. The great body of the stockholders residing in Oakland or other places in California, may take this view of it and be content to abide by the action of their directors. If this be so, is a bitter litigation with the city to be conducted by one stockholder for the corporation and all other stockholders, because the amount of his dividend is diminished?

This question answers itself, and without considering the other point raised by the demurrer, we are of opinion that it was properly sustained, and the bill dismissed, because the appellant by the bill shows no standing in a court of equity—no right in himself to prosecute this suit.

The decree of the circuit court is, therefore affirmed.

CONTRACT—COMPOSITION AGREEMENT—SECRET BONUS TO CREDITOR —OFFICIOUS ACT OF THIRD PARTY.

BANK OF COMMERCE v. HOEBER.

St. Louis Court of Appeals, February 28, 1882.

A composition agreement between a debtor and all of his creditors is rendered void by the fact that one of the creditors was induced to sign the agreement by the promise of the debtor's attorney to pay him a secret bonus, although the creditor knew at the time that such a promise was without the limits of the attorney's authority, and although such agreement was concealed from both debtor and the other creditor until after the settlement made under the composition agreement.

Appeal from the St. Louis Circuit Court.

Broadhead, Slayback & Haeussler, for appellant; *Albert Arnstein*, for respondent.

THOMPSON, J., delivered the opinion of the court:

The facts of this case, so far as need be stated, were as follows: In 1878, the defendant failed in business, and proposed to compound with his creditors at thirty-five cents in the dollar. He employed an attorney to visit his creditors and negotiate for this composition, empowering him not to offer more than thirty-five per cent. Among these creditors was the firm of James Levy & Bro., of Cincinnati, who refused to take less than fifty cents in the dollar. The plaintiff's attorney told them that he had no authority from his client to offer more than thirty-five cents, but that in order to induce them to sign the composition agreement he would give them his individual obligation in writing to pay them an additional fifteen per cent. They agreed to this, signing the agreement, by which all the creditors purported to release their respective demands against the defendant upon payment of thirty-per cent. thereof. The other creditors, among them the plaintiff, afterwards signed the agreement. The defendant paid thirty-five per cent in the dollar to all his creditors, in pursuance of the terms of the agreement, and took the same form of release from each one. Four days after he had paid James Levy & Bro. the thirty-five per cent. of this indebtedness to them, in pursuance of the composition agreement, a draft drawn by them upon his attorney, in pursuance of the agreement between them and the attorney, was paid by the latter. Treating the defendant as having proved what the circuit court refused to allow him to prove, it must be taken, for the purposes of this decision, that the defendant had no knowledge that his attorney had made this secret arrangement with James Levy & Bro. until after the composition agreement had been signed by all the creditors, and he had made payment to them in pursuance of its terms; that he had never authorized the making of this secret agreement; that he repudiated it as soon as it came to his knowledge, and refused, and still refuses to pay to his attorney the money paid by him under it. It must also be conceded, for the purposes of this decision, that in effecting the composition settlement the defendant's attorney was acting in pursuance of a special authority; that James Levy & Bro. had distinct notice of the limits of his authority: that in making this agreement with them for the payment of the additional fifteen per cent., he was acting outside the limits of his authority, as they well knew; that in so acting he was not acting as the defendant's agent but was acting officiously, and that his act was no more binding upon the defendant than the act of a mere stranger in the premises would have been. It must also be conceded that the defendant is wholly innocent of practising any fraud or deception upon his creditors with reference to this matter.

After the plaintiffs had signed the composition agreement, had received from the defendant thirty-five per centum of what was due upon two notes of the defendant which they held, surrendering these notes to the defendant and giving him a release of the full indebtedness which they represented, it came to their knowledge that the defendant's attorney had given this secret bonus to James Levy & Bro. They thereupon brought the present action for the indebtedness represented by these notes above the thirty-five per cent. paid under the composition agreement. The case was before this court at a former term (8 Mo. App. 171), and this court held that the action was well brought.

We have now to consider the question arising upon the facts developed in the evidence, as already set out: and the question is, whether, upon these facts, there can be any recovery. In other words, the question is—and we state it most strongly for the defendant, and concede all the conclusions of fact which we understand his counsel claim,—whether a composition agreement between a debtor and all his creditors is rendered void by the fact that one of the creditors was induced to sign the agreement by the officious act of a third person, in agreeing to pay him a sum of money in addition to that which he was to receive under the composition agreement; which agreement with the the third person was concealed from the other creditors until after the composition agreement had been signed and the settlement made by it fully executed, of which act of the officious intermeddler and the particular creditor the debtor was and is wholly innocent. We are of opinion that it is.

Ordinarily an agreement between a creditor and his debtor, whereby the former agrees to accept a part of what is due him in payment of the whole, is an agreement without consideration, and will not estop the creditor from afterwards suing and recovering the unpaid balance. Cumber v. Wane, Strange, 426. An exception to this rule arises where a creditor agrees to accept a certain per centage of his debt in discharge of the whole, in consideration of all the other creditors of the debtor doing the same. Such an agreement is not merely an agreement between each creditor and the common debtor; it is also an agreement among all the creditors who sign the composition agreement. Solinger v. Earle, 82 N. Y. 393, 396; Sage v. Valentine, 23 Minn. 102; Breck v. Cole, 4 Sandf. (S. C.) 79, 83. The consideration which supports it is that each creditor gets the per centage of his debt, the security or other benefit which is stipulated for on the face of the paper, and no more. Ibid. 1 Smith's L. Cas. *443. Such an agreement requires the utmost good faith; and if any of the creditors who sign it gets, as the price of signing it, a greater proportion of his debt, or a greater or better security, or any direct or collateral advantage which the others do not get, without the knowledge of the others, this avoids the agreement, and any one of the creditors may sue and recover of the debtor so much of his debt as remains unpaid. This is what was decided when this case was here before. Bank of Commerce v. Hoeber, 8 Mo. App. 171.

Where one of the creditors gets, as the price of signing the agreement, a preference over the other creditors, it is immaterial whether he gets it from the debtor or from a third person, or whether he gets it with the knowledge of the debtor, or whether the debtor is wholly innocent of it. By receiving such a preference, he commits a fraud on the other creditors; and the case falls within the principle that when a party to a contract conceals or misrepresents a material matter which forms the whole or a part of the inducement upon which the other contracting parties enter into the contract, this avoids the contract. Pulsford v. Richards, 22 L. J.. (Ch.) 559; s. c., 19 Eng. L. & Eq. 387. It is a misrepresentation or concealment *dans locum contractui*, is to the thing which gave occasion to the contract; therefore it avoids the contract. The creditors who sign such an agreement act, in a measure, upon the faith of each other's judgment, and they suppose, and rightfully suppose, that the judgment of each of the others creditors is influenced by the same considerations which influence their own judgment; and they are cheated by any creditor who is influenced by the motive of a benefit in which they do not share, and the knowledge of which is concealed from them. "If," said Best, C. J., "I see a man, acquainted with the circumstances of the debtor, agreeing to sign a paper under which he is to be satisfied with ten shillings in the pound, I conclude he has exercised a judgment upon the subject. Am I not cheated if he procures another to give him ten shillings more? Knight v. Hunt, 5 Bing. 432.

"A composition agreement," says the court of appeals of New York, in a late case, "is an agreement as well between the creditors themselves, as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a *pro rata* payment to all the creditors, a secret agreement by which a friend of the debtor undertakes to pay to one of the creditors more than his *pro rata* share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principles of equity and the mutual confidence as between creditors upon which the agreement is based, and diminishes the motive of the creditor who is a party to the secret agreement, to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction." Solinger v. Earb, 82 N. Y. 393, 396. Similar language was used by Duer, J., in Breck v. Cole, 4 Sandf. (S. C.) 79,83.

These principles have been constantly acted upon and applied in various ways. That the signature of one creditor to such an agreement has been obtained by a secret payment of money has, as was well said by an eminent judge of a Federal court, "always been held to be a fraud on creditors, independently of any clause in a statute, and without regard to who has made this payment." Lowell, J., in *Re* Whitney, 14 N. B. R. 3. Accordingly, under the English law, when the certificate of discharge of a bankrupt required the consent of his creditors, it was held to have been obtained by fraud, if any one, even without the knowledge of the bankrupt, paid money to induce a creditor to sign it. Robson v. Caze, Doug. 216; Holland v. Palmer, 1 Bos. & Pul. 95. The latter case is entirely like this in principal, and substantially like it in its facts. A bankrupt's brother-in-law, without his knowledge or privity, had paid ten guineas to one of his creditors to induce him to sign the certificate of the bankrupt's discharge. It was held that this avoided the discharge, and a creditor recovered judgment upon a demand which would have been barred by the discharge, if it had been good, just as the plaintiff is endeavoring to recover here. This principle was acted upon by Lowell, J., where the brother of a bankrupt purchased a claim against his estate without his knowledge, and with no motive which could be conceived of, except to benefit the bankrupt, and this was held to bar a discharge to which this creditor had consented. *Re* Whitney, 14 N. B. R. 1. It was acted upon by the same learned judge in another case, where two creditors had signed a composition agreement, one of them on the promise of a secret collateral benefit, and the other after having been paid something

not to oppose it, of all of which the bankrupt, so far as the evidence showed, knew nothing. *Re* Sawyer, 14 N. B. R. 241. No doubt the list of concurring authorities might be further extended.

It may be admitted that none of the foregoing cases is precisely like this in all its facts; but, as was said by Best, C. J., in a case of this kind: "As no two cases are ever alike in all respects, the best way is to extract a principle from analogous decisions; and the principle to be extracted from all the cases on this subject is, that a man who enters into an agreement of this kind is not to be deceived." Knight v. Hunt, 5 Bing. 432, 434. In that case the debtor himself had practiced no deception, but his brother had spontaneously given a gratuity to a particular creditor for signing the composition agreement, and it was therefore held that this creditor could not recover upon a promissory note for the amount which was to be paid under the composition agreement.

We are referred to the case of Babcock v. Dill, 43 Barb. 577, as opposed to the conclusion at which we have arrived. Without distinguishing that case upon its facts, which were peculiar and essentially different from these, and which, we could point out, would bring it within an entirely different principle, we shall merely say that if it goes to any extent against the current of decisions which we have cited, we decline to follow it.

It is said that this view of the law works a hardship upon the defendant, who is innocent of any wrong. The answer is, that it is no hardship for a man to be compelled to pay his honest debts in full, though it may be hard for him to do it. He agreed to do it when he contracted the debt, and he stands under a continued moral obligation to do it, until he has done it. It is a greater hardship for his creditors to be compelled to take a part of what is due them in discharge of the whole; and the law ought not to compel them to do this, except upon a mutual agreement, entirely open and fair, in which each one gets what the agreement purports to give him, and no more.

We need not go in detail into the rulings of the circuit court in rejecting evidence, and in instructing the jury. If we are right in these conclusions, these rulings were, all of them, correct, or, at least, not harmful to the defendant.

The judgment is, therefore, affirmed. BAKEWELL, J., concurs; LEWIS, P. J., absent.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

35. The public statutes of Massachusetts provide that when an issue of fact upon an answer in abatement is found against the defendant, a final judgment shall be rendered against him in the manner heretofore required in case of a plea in abatement. They also provide that the defendant may have leave to amend an answer in abatement, or to answer over by special order of court for good cause shown, and not otherwise. When the defendant answers in abatement, the non-joinder of certain persons in the plaintiff's writ, and upon the trial to the jury, it appears from the defendant's own evidence that he has not named all the persons who are liable with the defendant in his answer in abatement, ought the court to overrule the defendant's answer in abatement as matter of law, and allow the defendant to answer over to the merits upon the case as above stated, or ought it to order a verdict for the plaintiff, unless the defendant amends his answer in abatement by inserting the names of the persons disclosed in his evidence at the trial by special order of the court? In other words, does the case show good cause to allow the defendant to answer over to the merits? W. H. P.

36. Under the laws of Missouri the right of dower can only be conveyed by joining the husband in a deed executed by him, and acknowledged in the manner prescribed. If this agreement can be construed to be a jointure, then she can renounce, if she elects to do so, after her husband's death, but it is not a jointure. Good lawyers say the agreement discharges the husband's real estate of the right of dower. Some Wisconsin and Michigan cases are relied on. I do not think the point has been decided in Missouri, and I should be afraid to risk an opinion in favor of the agreement. C. H.

Brunswick, Mo.

37. M, a married woman, living in Texas in A. D. 1871, made a deed of all her real and personal property to D, her husband. Before signing the deed, she, at the foot of same and immediately following, writes her will. 1st. Commits to the care of her husband her granddaughter, A. 2nd. "I do solemnly request my husband. D, and my two sons, to educate my said granddaughter, and to do in every respect for her as they know I would advise and approve if I were alive and present." 3d. Wills all of her property to her husband, D. M died in A. D. 1871. The will was never probated. D possessed the estate under the will, which is real estate, and now worth $50,000. What are the rights of the granddaughter, and how can she enforce the same? A. M. C.

Fort Worth, Tex.

QUERIES ANSWERED.

Query 11. [14 Cent. L. J. 179.] A had on deposit in the bank of C, the sum of $5,000, and was indebted to the bank on note in the sum of $3,000, when the bank failed and passed into the hands of a receiver. Must A pay the note and take his chances with the other creditors, or is he entitled to offset his deposit against the note? M.

St. Louis, Mo.

Answer No. 1. This question has been frequently raised in cases of the insolvent Mastin Bank and Missouri Valley Bank of this city (Kansas City, Mo.), and has been decided both ways by our circuit judges. Judge Gill, of circuit court division No. 2, in a recent able and well-reasoned opinion, published in full in the Kansas City *Times*, holds that A would be entitled

to offset his deposit against the bank. He cites the following authorities in his opinion: Lindsay v. Jackson, 2 Paige, 581; Chance v. Isaacs, 5 Paige, 594; Gay v. Gay, 10 Paige, 518; Waterman on Set-off, 83-84, and cases cited; Knight v. Walls, 27 Ind. 387; 2 Smith's Leading Cases, 324-325, and cases cited; Bradley v. Angel, 3 Comstock (N. Y.), 475; Martin v. Kunzmuller, 37 N. Y. 400; Smith v. Felton, 43 N. Y. 419; Jordan v. Sharlock, 84 Pa. St. 366; Morrow v. Bright, 20 Mo. 298; Field v. Oliver, 43 Mo. 200; Reppy v. Reppy, 46 Mo 573. ALBERT YOUNG.

Kansas City, Mo.

Answer No. 2. The natural presumption is that A held a certificate of deposit which was an evidence of debt against the bank of C, and the note of A in the hands of said bank is evidence of debt against A; and both evidences of debt in either hands were liquidated and personally owing to each other; consequently, in reason, justice and good law too numerous to cite, one debt would be a legal offset against the other for the full amount of said note of $3,000, and the balance, $2,000 on deposit, A would be required to share and share alike in the distribution of as bank assets, with all other creditors of the bank of C.

Grand Rapids, Mich. THOS. H. GIRARD.

Query 13. [14 Cent. L. J. 179.] A obtained judgment against B in the circuit court in 1874, and being unable to find property, no execution was issued, nor was the judgment revived. In 1876 B died intestate, and no administration has been had upon the estate. In 1880, B's heirs bring suit in partition against B's brother for an interest in lands which B acquired by descent before rendition of the judgment, and get judgment for forty acres. Can A maintain suit on his judgment against these heirs of B and have the land sold, or must the estate of B be administered upon? M.

Answer No. 1. The answer probably depends upon the provisions of the statute, although at common law the heir was liable on judgments recovered against the ancestor. In Illinois, suit may be brought upon a judgment within twenty years after its date. R. S. Ill. (Hurd's Ed., 1877), ch. 83, sec. 25. And if no one administers on the estate of a deceased person for the space of one year after his death, a separate suit may be maintained against the heirs on all contracts and undertakings of such deceased person. Ib., ch. 59, sec. 15. As to the extent of the heir's liability, pleading, proof, etc., see 81 Ill. 240; 82 Ill. 91; 85 Ill. 453; 89 Ill. 71. R. WOLCOTT.

Springfield, Ill.

Answer No. 2. A and B, being brothers, and having acquired the said estate by descent, they were joint tenants, and no creditor's claim can operate as a lean until the estate is divided by a decree of partition; the said partition accomplished before said judgment is barred by the statute of limitation, or if the forty acres are more in number or greater in value than the State laws exempt from execution, the balance would be subject to any creditor's claim. It is a fact (and the books are full of principles that will support this statement) that after the death of B intestate, the land could not be sold for the payment of the debts of the estate without administration, if objections were taken in the proper legal manner by other creditors or the legal heirs of the deceased.

Grand Rapids, Mich. T. H. GIRARD.

WEEKLY DIGEST OF RECENT CASES.

ADMINISTRATION—DISCHARGE OF EXECUTOR.

Until the entry of a decree discharging the executor, the trust still continues in contemplation of law, and such executor remains clothed with the duty and authority of his office. Until the entry of such decree the estate is not settled. *Dohs v. Willoughby*, S. C. Cal., March 22, 1882.

ADMINISTRATION—POWERS OF EXECUTORS—MORTGAGES.

Where an executor invests funds belonging to an estate in a mortgage, and subsequently on foreclosing that mortgage buys in the mortgaged premises in order to save the debt, and takes the title thereto in his own name as executor, this will not work such a conversion as to prevent the executor from afterwards selling the premises and making a good title thereto. *Johnson v. Bliss*, S. C. Pa., February 20, 1882.

ADMINISTRATOR—APPOINTMENT OF—DISCRETION OF APPOINTING POWER.

In granting letters of administration, the register is not at liberty to disregard the clearly expressed wishes of the parties preferred by the law and entitled to the estate, even if they be non-residents of the Commonwealth. If he has appointed a total stranger, he should, upon application of such parties, vacate the letters already granted, and appoint some suitable nominee of such parties in whom they can confide. *Jones' Appeal*, S. C. Pa., March 14, 1882.

APPEAL—APPELLATE JURISDICTION—LIMITS OF—TEMPORARY INJUNCTION.

1. It is within the appellate jurisdiction of the Supreme Court to allow a temporary injunction where it appears that defendant is doing, or threatens to do, acts respecting the subject of an action pending, tending to render the judgment ineffectual. 2. So, where the relief sought in the court below was an injunction which was refused, and on error to this court, the judgment is reversed for such refusal, this court may, in the exercise of its appellate jurisdiction, proceed to render the judgment which the court below should have rendered. *Wagner v. New York, etc. R. Co.*, S. C. Ohio, March 28, 1882.

APPEAL—DISCRETION OF COURT BELOW.

The abuse of legal discretion in the trial court, in refusing to allow a supplementary answer to be filed, setting up a release of the cause of action, is subject to review on appeal. *Seehorn v. Big Meadows, etc. Road Co.*, S. C. Cal., March 21, 1882.

ATTORNEY AND CLIENT—DISBARRING—COLLUSIVE SUIT.

For an attorney to bring a suit upon a fictitious note against an insolvent firm, for the purpose of enabling it to avoid compulsory bankruptcy proceedings on the part of its creditors, *held* to be sufficient grounds for disbarring the attorney. *In re Napthaly*, S. C. Cal., December 30, 1881.

BANKRUPTCY—DISCHARGE—WHO IS BOUND BY—IMPEACHMENT OF DISCHARGE.

1. A bankrupt can plead his discharge in bankruptcy in bar of an action against him by a creditor whose debt was not scheduled, and who was not served with notice from the bankrupt court. 2. A bankrupt's discharge can not be impeached in a State court for any of the causes which would have prevented the United States District Court

from granting the discharge. *Brown v. Causey*, S. C. Tex., Comr. of Appeals, March 6, 1882.

CONSTITUTIONAL LAW — SUNDAY LEGISLATION — POLICE POWER.

Sunday laws are constitutional on the ground that the legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and it is of opinion that periodical cessation from labor will tend to both, there is no power outside of its constituent which can sit in judgment upon its action. It is not the province of the judiciary to pass upon the wisdom and policy of legislation. *Ex parte Koser*, S. C. Cal., March 10, 1882.

CONTRACT — TO ABSTAIN FROM BUSINESS — CONSTRUCTION.

Martin & Reid sold their dairy business to appellant, agreeing with him not to engage in the diary business or the sale of milk in the town of Crawfordsville so long as appellant should continue in the business on his own account. Afterward Martin regularly furnished milk to Gunkle and Oliver, at his farm outside the corporate limits of the town, and they resold it to customers in Crawfordsville. Appellant sued Martin for a breach of his contract. *Held*, though the agreement should be fairly constructed in view of the objects and purposes of the parties to it, yet it can not be enlarged by the construction so as to extend the limits of the district in which the appellee was prohibited from doing business. 14 Kas. 609; 78 Pa. St. 196. The appellee could not, under the contract, establish a dairy and milk depot on his farm outside the town, and solicit customers from the town and supply them with milk. But he could sell milk outside the town to any one not living in the town, and who, for that reason, could not be a customer of the appellant. Nor would the fact that the person so purchasing from him resold the milk to customers within the town render the appellee liable. The purchaser would have the right to sell where he pleased; with this the appellee would have no concern, unless interested in the sales made. *Smith v. Martin*, S. C. Ind., April 7, 1882.

CONTRACT—SURGEON'S BILL.

A man being injured by reason of an accident occurring on a boat of which appellant was captain, appellant left him at the office of appellee, a surgeon, who was absent, with instructions for appellee, upon his return, to give the man every necessary attention, and have him ready to be sent home on the boat that night. Appellee dressed the man's wounds, so as to enable him to go home that night, and sues appellant for the value of his services. *Held*, that these facts authorized the verdict against appellant, although he may never have known or seen appellee, nor could the pending of an action by the appellee against the packet company be pleaded in abatement to this action. *Berry v. Pusey*, Ky. Ct. App., March 25, 1882.

CONVEYANCE—DELIVERY OF DEED—ESCROW.

Mrs. Gray was the owner of certain property, which appellant offered to buy at a certain price. His offer was accepted, and a deed to the property was sent by Mrs. Gray and her husband to Garvin to be delivered to appellant upon his paying the stipulated price. Charnley, knowing all this, procured the Grays to instruct Garvin not to deliver the deed, and bought the property himself. Appellant then tendered Charnley the agreed price of the property and demanded a deed. *Held*, that the deed was in the hands of Garvin merely as an escrow to be delivered on the payment of the purchase-money. A deed so delivered does not become operative until rightfully delivered to the grantee. It appears that no delivery was made to appellant, and that while the deed was in the hands of the depository and before the performance of the condition, it was, at the request of the grantors, annulled and destroyed. This they could lawfully do. *Freeland v. Charnley*, S. C. Ind., April 4, 1882.

CORPORATION—LAWS OF THE STATE OF ITS CREATION—EXTRA-TERRITORIAL FORCE.

Creditors of a corporation, who are at the same time members of it, as such members have assented to the laws of the state of its creation, which control the settlement of its affairs, upon its being dissolved; *i. e.*, they have assented that the officers by whom, and the place and manner, shall be such as the laws of that State provide. The effect of this contract and assent makes the territorial extent of the authority of the person charged with the liquidation co-extensive with the authority of an assignee in bankruptcy, or a receiver of a national bank, springing from the territorial effect of a national law. *Rundle v. Life Association of America*, U. S. C. C., D. La., February 23, 1882.

CORPORATION—STOCKHOLDERS' LIABILITY—EQUITY—MARSHALLING ASSETS.

Where the personal liability of stockholders of a corporation is made by statute a common fund for the benefit of depositors of trust and savings funds, and the debts due such depositors greatly exceed the assets, and such personal liability combined so that the funds will be insufficient to discharge all the claims upon it, a court of equity may, at the suit of creditors, on their behalf and that of all other such creditors, take jurisdiction and bring before it all the stockholders and depositors, and determine the several rights and liabilities, and adjust equities, marshal the fund, distribute it *pro rata*, and, in such case, enjoin the prosecution of suits at law by individual creditors against stockholders, seeking to appropriate the entire and unequal benefit of such security. The securing of a ratable distribution of such fund among all the creditors entitled to share, is a proper ground for equitable jurisdiction, and so is the avoidance of a multiplicity of suits. *Otis v. Davis*, S. C. Ill., March 28, 1882.

DEED—DESCRIPTION—ROAD-BED.

A deed described the land as beginning at a point on the south side of a road adjoining the land of S, and, after running certain courses and distances, the line ran along the lands of L 594 feet to the road, and thence along the road to the place of beginning. *Held*, that the road-bed was excluded; that the description was controlled by the starting-point, and fairly imports that the measurement is to the side of the road. *King's County Fire Ins. Co. v. Stevens*, New York Court of Appeals, January 17, 1882.

DIVORCE — DESERTION — AGREEMENT TO LIVE APART.

A husband at the time of marriage obtained from his wife, without any reasonable cause, an agreement that they should live apart. Accordingly they never cohabited, and the wife committed adultery. *Held*, that the husband had deserted his wife, and that his petition for dissolution must be dismissed. *Dagg v. Dagg*, Eng. H. Ct., Prob. Div. & Adm. Div., January 19, 1882.

EVIDENCE — HUSBAND'S INTEREST — COMPETENCY OF WIFE.

At common law the wife could not be a witness when her husband had an interest in favor of the party calling her, but was not a party to the suit because his interest disqualified him. but she was competent to testify against her husband's interest when he was not a party, or to contradict testimony given by him in the same case, or even to impeach him. But under our statute removing the disqualification of the husband from interest, his wife is made competent to testify in behalf of her husband's interest in a case where he is not a party to the record, as where he is a stockholder of a corporation calling her. *Lincoln Ave., etc. Road Co. v. Madaus*, S. C. Ill , March 28, 1882.

EXEMPTION—HEAD OF A FAMILY—BASTARD CHILD.

The same reasons that exempt from execution certain property of the debtor, in order that he may be enabled to support his dependent brother, sister or parent, require that he should likewise be protected and encouraged to reclaim, support and bring up in proper courses his bastard child. *Bell v. Keach*, Ky. Ct. App., March 11, 1882.

FEDERAL COURTS—JURISDICTION—COLLUSIVE PARTIES.

Where parties conveyed land to a stranger, a citizen of another State, without his knowledge and without consideration, for the express purpose of creating a case of jurisdiction in the United States courts, and immediately, with the subsequent consent of the grantee, commenced a suit in the United States Circuit Court for the benefit of the grantors, expecting a reconveyance, although care was taken that there should be no promise made to reconvey: *Held*, that the transaction was only colorable and collusive for the improper purpose of creating a case of jurisdiction for the courts of the United States within the provisions of the Act of Congress of 1875, and that the suit must be dismissed for want of jurisdiction. *Coffin v. Haggin*, U. S. C. C., D. Cal., March 13, 1882.

FRAUDULENT CONVEYANCE—SUBSEQUENT CREDITORS.

A man who is about to immediately enter into a hazardous business is not entitled to settle all his property voluntarily, his object being to put the settled property beyond the reach of his future creditors in the event of failure in the intended business; such a settlement will be declared to be void under the statute 13 Eliz. c. 5, at the instance of the future creditors. *Ex parte Russell*, Eng. Ct. App., February 24, 1882.

HOMESTEAD—MORTGAGE—SALE.

A mortgage, in which the wife of the mortgagor does not join, does not give to the mortgagee any lien upon the homestead embraced in the mortgage, and the mortgagor may sell it as if no mortgage had been made. The homestead being exempt from the demands of creditors, they have no right to complain that the sale of it was without a valuable consideration. *Tong v. Eifort*, Ky. Ct. App., March 7, 1882.

HOMICIDE—SELF-DEFENSE—DEFENDANT TAKEN IN ACT OF ADULTERY.

If the defendant was taken by deceased in the act of adultery with his wife, and to avenge the wrong deceased made a dangerous or murderous assault upon him, in resisting which he took the life of deceased, under such state of facts defendant would be guilty of manslaughter, because he was committing a misdemeanor which was the cause and brought about the necessity of the homicide. *Reed v. State*, Tex. Ct. App., March 11, 1882.

HUSBAND AND WIFE—LEVY OF EXECUTION AGAINST HUSBAND ON WIFE'S PROPERTY — REMEDY AGAINST SHERIFF.

Under an execution issued against A, a levy was made by the sheriff on personal property of A's wife, and the sheriff, subsequently going out of office, transferred the writ to his successor, who sold the property, notwithstanding a notice that it belonged to the wife. It was purchased by B, who leased it to A at $10 per annum. In an action of trespass brought, in right of the wife, against the sheriff and his deputy: *Held*, 1. That the fact that the levy was made by the predecessor in office of the defendant, furnished no justification or excuse for enforcing the levy or selling the property of the wife, after notice of her title. 2. That the wife's right of action against the sheriff for illegally advertising and selling her property could not be defeated by the act of husband in recognizing the right of the purchaser at sheriff's sale and agreeing to pay him a stipulated sum for the use of the property. The sheriff returned "that after giving due and legal notice he did, on * * * sell the property," etc. *Held*, that the return was conclusive on him and neither manual taking, occupation or removal was essential to render him liable to the beneficial plaintiff. *Freeman v. Apple*, S. C. Pa., January 2, 1882.

HUSBAND AND WIFE—TENANCY IN COMMON.

Where the intention is manifest, and apt words are employed to create a tenancy in common or a joint tenancy, in this State husband and wife are now capable of taking and holding as tenants in common or as joint tenants, according to the express terms of the grant, and if at common law they were incapable of so taking and holding, the effect of the statute law is to remove that incapacity. *Fladung v. Rose*, Md. Ct. App., October Term, 1881.

LANDLORD AND TENANT—PROCEEDINGS AGAINST TENANT TO BIND LANDLORD.

If the landlord becomes regularly a party to a suit he is, of course, bound like any other party. But where the suit is brought against the tenant alone, and it is not pretended that the landlord had any notice or knowledge of the fact. it would seem plain that in no legal sense is he a party so as to be bound by the judgment. But suit against the tenant stops the running of the statutes of limitation in favor of the landlord. *Read v. Allen*, S. C. Tex., January 31, 1882.

LIMITATIONS—DUE BILL PAYABLE ON DEMAND.

The statute of limitations runs upon a due bill payable "on demand," from its date. The words "on demand" do not make the demand a condition precedent to a right of action, but import that the debt is due and demandable immediately. *Andress' Appeal*, S. C. Pa., March 21, 1882.

MALICIOUS PROSECUTION—PROBABLE CAUSE.

In an action for malicious prosecution it is error for the court to charge that the bare fact of "arrest and liberation" in the police court establishes conclusively a want of probable cause. *Rogers v. Mahoney*, S. C. Cal., March 20, 1882.

MALICIOUS PROSECUTION—REASONABLE AND PROBABLE CAUSE.

The defendant prosecuted the plaintiff for perjury alleged to have been committed in an action for rent brought by the defendant against the plaintiff's father. The plaintiff was acquitted, and

thereupon sued the defendant for damages for malicious prosecution. The jury were directed that in an action for malicious prosecution, the plaintiff must prove affirmatively the absence of reasonable and probable cause and the existence of malice. The learned judge then told them, if they came to the conclusion that the plaintiff had spoken the truth, but that the defendant had a very treacherous memory, and went on with the prosecution under the impression that the plaintiff had committed perjury, yet if that was an honest impression, the upshot of a fallacious memory, and acting upon it, he honestly believed that the plaintiff had sworn falsely, they would not be justified in finding that the defendant had maliciously and without reasonable and probable cause prosecuted the plaintiff. *Held*, a right direction. *Hicks v. Faulkner*, Eng. Ct App., March 8, 1882.

MARRIED WOMAN — POWER TO CONFESS JUDGMENT.

A married woman can execute a valid bond and warrant of attorney to confess judgment upon a debt or contract which was binding upon her and on which she was liable to be sued. *Heywood v. Shreve*, S. C. N. J., February Term, 1882.

MORTGAGE—ACCOUNTING BY MORTGAGEE IN POSSESSION.

A mortgagee in possession will not be held accountable for anything more than the actual rents and profits received, unless there has been wilful default or gross negligence on his part, and is entitled to credit for usual expenses in the case of such property, and for money paid to mortgagor's wife, after his death, in pursuance of an order signed by him. *Murdock v. Cox*, S. C. Cal., March 18, 1882.

NEGLIGENCE—HORSE RACING—FOUL RIDING—LIABILITY OF OWNER.

The owner of a horse entered for a race takes all the risks incident to the race; and if a horse is intentionally fouled, or purposely runs against or interferes with a competing horse in the race by the rider, the employer of such rider is liable for damages for any injury which results. If a jockey attempts to take the track ahead of another horse before his horse is a clear length ahead of the other horse, or if he crowds the other horse, so as to impede him, or compels his jockey to hold him in, or change his course to avoid a collision, it would be foul riding; and the fact that the rider who attempts a foul runs as great risk to himself and his horse as he imposes on his competitor, will not justify him in attempting a foul. *McKay v. Irvine*, U. S. C. C., N. D. Ill., February 22, 1882.

NEGLIGENCE— MASTER AND SERVANT — FELLOW-SERVANT.

A railroad company is not liable for injuries inflicted on a person through the negligence of a fellow-servant of such person. Fellow-servants or co-servants, within this rule, are persons engaged in the same common service under the same general control. Where one servant is invested with control or superiority over another with respect to any particular part of the business, they are not, with respect to such business, fellow-servants within the meaning of the law. *Gravelle v. Minneapolis, etc. R. Co.*, U. S. C. C., D. Minn.

PARTNERSHIP—DISSOLUTION—NEGOTIABLE PAPER—DEMAND.

About the time of the dissolution of defendant's firm, M, one of the firm, procured a loan from plaintiff, who had no knowledge of the dissolution, upon a promissory note payable on demand to the order of the firm and indorsed by it. Payment had been demanded by the firm of the makers and refused two years before. After the loan was made, M assumed to collect the note for plaintiff, and made a demand on the firm. No other demand was made. *Held*, that defendants were liable, and that no other demand was necessary. *Devlin v. Reiners*, N. Y. Ct. App., December, 1881.

USURY—CIRCUMSTANCES TO CONDONE.

When money is loaned at illegal interest, the fact that the money loaned had been borrowed by the lender himself, at illegal rates, or, to accommodate his debtor in the way of time, he had contracted such loan in order to meet his own necessities, will not condone the usury. *Woods' Appeal*, S. C. Pa., October 3, 1881.

WILL—UNDUE INFLUENCE OF CHIEF BENEFICIARY BURDEN OF PROOF.

Where the chief beneficiary in a will was the confidential adviser of the testator, and was the main instrument in procuring the preparation and execution of the will, he will be required to prove affirmatively the circumstances connected with the drawing of the will, that the testator was laboring under no mistaken apprehension as to the value of his property and the amount he was giving his confidential adviser, and that such gift was the free, intelligent act of the testator. The court below in this case granted an issue as to the question of undue influence, and refused an issue upon the question of testamentary incapacity. *Held*, that the evidence upon the latter point amounted to more than a *scintilla*. In a case where the person is of great age, suffering from severe illness affecting his brain and vital powers, and where an investigation of a charge of undue influence is admittedly essential, it is best not to limit the investigation to that one matter. Under such circumstances undue influence and mental incapacity are very closely interwoven. *Wilson's Appeal*, S. C. Pa., March 13, 1882.

RECENT LEGAL LITERATURE.

AMERICAN CRIMINAL REPORTS. A Series designed to Contain the Latest and most Important Criminal Cases determined in the Federal and State Courts in the United States, as well as Selected Cases. Important to American Lawyers, from the English, Irish, Scotch and Canadian Law Reports, with Notes and References. By John G. Hawley. Vol. 3. Chicago, 1881: Callaghan & Co.

Of all the recent enterprises in the way of series of selected reports, there is none which is destined to attain a wider popularity or is worthy of a more general support than this. Outside of a few large cities almost every lawyer is, to no inconsiderable extent, a practitioner in criminal courts. Consequently a series of reports which gathers up all the criminal precedents of any practical value, from the multitudinous original volumes, in which they are primarily presented to the profession, and brings them together in a compact shape, within the

means of every lawyer, renders a service of practical value, which can not fail to gain appropriate recognition provided the task undertaken is accomplished in a thorough and efficient manner. In this instance this condition is fully complied with. The cases selected for publication are of real, general and permanent interest. The head-notes are brief and condensed, and are framed with a care and precision that are as creditable as they are unusual. The annotations, though in most instances quite brief, are frequent and quite pointed, abounding in citations of authority. The absence of long, essay-like notes, filling valuable space, which might be otherwise more profitably utilized, seems to us an excellence rather than an imperfection, especially in a volume of precedents in criminal law. Altogether, the series appears to be such, both in the work laid out, and in manner of execution, that no member of the profession who devotes any considerable portion of his attention to criminal cases can afford to be without it.

LEGAL EXTRACTS.

NEW JERSEY LEGISLATURE.

The legislature is getting into the bad habit of passing resolutions on subjects it has nothing to do with. The resolutions, of course, have no practical effect, and they are, therefore, often passed without due consideration. If they mean anything, however, they are an expression of the opinion of the representative body of New Jersey, and foolish resolutions on important public matters are very mortifying to good citizens. It is no great matter when our legislature volunteers advice to Queen Victoria as to the conduct of her wars in South Africa, or the treatment of her oppressed subjects in Ireland, but a recommendation to the President in regard to the punishment of Sergeant Mason comes nearer home, and ought not to be made thoughtlessly. We can not believe that the legislature, as a body, intended seriously to urge upon the President the views expressed in that resolution. Sergeant Mason was guilty of a gross breach of military discipline, and is, therefore, properly left to the judgment of the military authorities, but, besides this, he was guilty of a cowardly crime, detestable to every manly mind, an attack on a prisoner committed to his charge. To say that he had the sympathy of the people in the feeling which prompted his act, is to say that the American people are willing to let a man be lynched after he has been taken into the custody of the law. The American people are not cowardly or mean enough to suffer such a thing. If there is any such feeling lurking anywhere, the swift punishment of Mason's cowardly act will do something to suppress it.—*New Jersey Law Journal.*

THE LAMSON CASE.

The affidavits to mental disease on which the application of our Government to that of Great Britain in this case was founded, present, in a very different phase, the same underlying question which added so great a professional interest to the universal popular attention attracted by the case of Guiteau. A man conversant with narcotics, poisons and antidotes, a physician by profession, gradually yields to an habitual indulgence in morphine, which originated in proper medical use for relief from pain, and becomes wholly unhinged from practical life, incapable for ordinary affairs alike when under the influence of the drug and when suffering the reaction from the disuse of it. He presents to his friends the appearance not only of a dangerous situation for himself, but a man of dangerous powers by reason of the decay of his mind and of his self-restraint, while his familiarity and freedom in the use of deadly poisons increases. They caution each other not to let him prescribe or give medicine. They watch him lest he do himself or others mischief. He passes from one hospitable refuge to another, making the same warning impression. At last, in the necessities in which his wasted life leave him, he recklessly uses on another the fatal drug he has so often used on himself. Few men of observation do not see around them parallels to the incipient stages of this course.

The question of criminal responsibility under such circumstances is doubtless a grave one, but if the sanctions of the criminal law do not protect the community, what shall take their place?—*New York Daily Register.*

NOTES.

——The following is vouched for as an actual occurrence recently in a justice's court in —— County, Alabama. A defendant, who was not a lawyer, but "had read law," especially Jefferson's Manual of Parliamentary Law, was representing his own case in a trial before the justice. The lawyer on the other side was making his concluding argument and pressing some vigorous points against the defendant, when the latter arose and moved that the court adjourn. The opposing counsel, after recovering from the bewildering effect of such a motion, affected to ridicule it, but was promptly called to order by the defendant, who made to the court the point that, according to Thomas Jefferson, a motion to adjourn was always in order and was not debatable. The justice, who was a great admirer of Jefferson, sustained the point and adjourned his court for the term.